

1991

Televised Justice: Toward a New Definition of Confrontation Under Maryland v. Craig

Theresa Cusick

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

Theresa Cusick, *Televised Justice: Toward a New Definition of Confrontation Under Maryland v. Craig*, 40 Cath. U. L. Rev. 967 (1991).

Available at: <https://scholarship.law.edu/lawreview/vol40/iss4/9>

This Notes is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

TELEVISED JUSTICE: TOWARD A NEW DEFINITION OF CONFRONTATION UNDER *MARYLAND V. CRAIG*

Increased public awareness¹ of child abuse, indicated by the dramatic rise in reported cases,² has brought more children to court. As witnesses in child sex abuse cases, however, children present special problems. Children may be psychologically traumatized³ by testifying in court in the presence of the defendant. It is common for the child to know the abuser, frequently as a relative or a friend.⁴ Further, children may be more susceptible to suggestion than adults and tend to have shorter memories than adults.⁵ These factors make "it . . . questionable whether children can be effective and competent witnesses."⁶

Yet despite these problems, the existence of credible child witness testimony remains crucial to the successful prosecution of most child sex abuse cases: child sex abuse victims are usually the only direct witnesses to their abuse and most states do not require the testimony of the child to be corroborated.⁷ Often there is no medical or physical evidence that sexual abuse occurred.⁸ Thus, in a very real sense it is often the victim's word against the accused.⁹

1. One commentator characterized this awareness as "bordering on hysteria." Michael H. Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. MIAMI L. REV. 19, 20 (1985).

2. See Paula E. Hill & Samuel M. Hill, Note, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 809 n.1 (1987) (citing Glenn Collins, *Studies Find Sexual Abuse of Children is Widespread*, N.Y. TIMES, May 13, 1982, at C1, col. 1 (noting a "200% increase in reported sexual offenses against children since 1976")).

3. Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 818 (1985) ("[O]nly a rare child could fail to be traumatized by the experience of testifying in court.").

4. Hill & Hill, *supra* note 2, at 809 n.1 (citing MacFarlane, *Sexual Abuse of Children, THE VICTIMIZATION OF WOMEN* 81, 86 (1978)).

5. Thomas L. Feher, *The Alleged Molestation Victim, The Rules of Evidence, and the Constitution: Should Children Really Be Seen and Not Heard?*, 14 AM. J. CRIM. L. 227, 231 (1988).

6. Lucy Berliner, *The Child Witness: The Progress and Emerging Limitations*, 40 U. MIAMI L. REV. 167, 169 (1985).

7. Feher, *supra* note 5.

8. Berliner, *supra* note 6, at 171.

9. Feher, *supra* note 5, at 243. Feher notes that "traditional, aggressive methods of cross-examination will not work" to test the child's testimony "because such tactics will promote sympathy for the child and ire at the defense." *Id.* at 244.

In response to this dilemma, many states have adopted statutory measures to ease the trauma experienced by child victims in court.¹⁰ In addition, some courts make special provisions for child witnesses, such as allowing leading questions in direct testimony¹¹ and barring spectators and the press from the courtroom during the child's testimony.¹²

A majority of states have enacted statutes that are aimed primarily at protecting child sex abuse victims from testifying in open court in the presence of the accused.¹³ These statutes fall into two broad categories. Some facilitate the admission of a child's out-of-court statements as substantive evidence.¹⁴ Others allow child sex abuse victims to testify via an alternative means, either by closed circuit television during trial¹⁵ or by a prior video-

10. See Josephine Bulkley, *Introduction: Background and Overview of Child Sexual Abuse: Law Reforms in the Mid-1980's*, 40 U. MIAMI L.REV. 5, 6-8 (1985); Eleanor L. Owen, Recent Development, *The Confrontation Clause Applied to Minor Victims of Sexual Abuse*, 42 VAND. L. REV. 1511, 1512-14 (1989).

11. Berliner, *supra* note 6, at 171.

12. *Id.* at 172.

13. *Maryland v. Craig*, 110 S. Ct. 3157, 3167 (1990).

14. These hearsay statutes are beyond the scope of this note.

15. Twenty-four states have laws that allow the use of one-way closed circuit television (in which the child cannot see the defendant). See ALA. CODE § 15-25-2 (Supp. 1989); ALASKA STAT. ANN. § 12.42.046 (Supp. 1989); ARIZ. REV. STAT. ANN. § 13-4253 (1989); CONN. GEN. STAT. § 54-86g (1989); FLA. STAT. ANN. § 92.54 (West Supp. 1991); GA. CODE ANN. § 17-8-55 (Michie Supp. 1989); ILL. REV. STAT. ch. 38, para. 106A-3 (1987); IND. CODE § 35-37-4-8 (1988); IOWA CODE § 910A.14 (Supp. 1990); KAN. STAT. ANN. § 38-1558 (1986); KY. REV. STAT. ANN. §§ 421-350(1), (3) (Baldwin Supp. 1989); LA. REV. STAT. ANN. § 15:283 (West Supp. 1990); MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (1989); MASS. GEN. LAWS ANN. ch. 278, § 16D (West Supp. 1990); MINN. STAT. § 595.02(4) (1988); MISS. CODE ANN. § 13-1-405 (Supp. 1989); N.J. REV. STAT. § 2A:84A-32.4 (Supp. 1989); OKLA. STAT. tit. 22, § 753(B) (Supp. 1988); OR. REV. STAT. § 40.460(24) (1989); 42 PA. CONS. STAT. §§ 5982, 5985 (1988); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1989); TEX. CODE CRIM. PROC. ANN. art. 38.071, § 3 (West Supp. 1991); UTAH RULE CRIM. PROC. 15.5 (1990); VT. RULE EVID. 807(d) (Supp. 1990).

Eight states authorize the use of two-way closed circuit television (in which the child can see the defendant on a television monitor). See CAL. PENAL CODE. § 1347 (West Supp. 1990); HAW. REV. STAT. ch. 626, Rule Evid. 616 (1988); IDAHO CODE § 19-3024A (Supp. 1989); MINN. STAT. § 595.02(4)(c)(2) (1988); N.Y. CRIM. PROC. LAW §§ 65.00-30 (McKinney Supp. 1990); OHIO REV. CODE ANN. §§ 2907.41(C), (E) (Baldwin 1986); VA. CODE ANN. § 18.2-67.9 (Michie 1988); VT. RULE EVID. 807(e) (Supp. 1990).

Thirty-seven states allow child sex abuse victims to testify via videotape. See ALA. CODE § 15-25-2 (Supp. 1989); ARIZ. REV. STAT. ANN. §§ 13-4251, -4253(B), (C) (1989); ARK. CODE ANN. § 16-44-203 (Michie 1987); CAL. PENAL CODE § 1346 (West Supp. 1990); COLO. REV. STAT. §§ 18-3-413, 18-6-401.3 (1986); CONN. GEN. STAT. § 54-86g (1989); DEL. CODE ANN. tit. 11, § 3511 (1987); FLA. STAT. ANN. § 92.53 (West Supp. 1991); HAW. REV. STAT. ch. 626, Rule Evid. 616 (1988); ILL. REV. STAT. ch. 38, para 106A-2 (1989); IND. CODE §§ 35-37-4-8(c), (d), (f), (g) (1988); IOWA CODE § 910A.14 (1987); KAN. STAT. ANN. § 38-1558 (1986); KY. REV. STAT. ANN. § 421.350(4) (Baldwin Supp. 1989); MASS. GEN. LAWS ANN. ch 278, § 16D (West Supp. 1990); MICH. COMP. LAWS ANN. § 600.2163a(5) (West

taped deposition which is presented to the jury at the time of trial.¹⁶ Although the defendant's attorney must be present to cross-examine the witness and must be in communication with the defendant during cross-examination, the defendant is not physically present during the testimony.¹⁷ The goal of these statutes is to foster more accurate and truthful testimony by shielding the testifying child from the trauma of facing the defendant in an open courtroom.¹⁸ These new statutes, designed literally to hide the defendants from their alleged victims, are in conflict with the defendants' right to confront their accusers in open court, as guaranteed by the Sixth Amendment's Confrontation Clause.¹⁹

Supp. 1990); MINN. STAT. § 595.02(4) (1988); MISS. CODE ANN. § 13-1-407 (Supp. 1989); MO. REV. STAT. §§ 491.675-.690 (1986); MONT. CODE ANN. §§ 46-15-401-403 (1989); NEB. REV. STAT. § 29-1926 (1989); NEV. REV. STAT. § 174.227 (1989); N.H. REV. STAT. ANN. § 517:13-a (Supp. 1989); N.M. STAT. ANN. § 30-9-17 (Michie 1984); OHIO REV. CODE ANN. §§ 2907.41(A), (B), (D), (E) (Baldwin 1986); OKLA. STAT. tit. 22, § 753(C) (Supp. 1988); OR. REV. STAT. § 40.460(24) (1989); 42 PA. CONS. STAT. §§ 5982, 5984 (1988); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1989); S.C. CODE ANN. § 16-3-1530(G) (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 23A-12-9 (1988); TENN. CODE ANN. §§ 24-7-116(d), (e), (f) (Supp. 1989); TEX. CODE CRIM. PROC. ANN. art. 38.071, § 4 (West Supp. 1991); UTAH RULE CRIM. PROC. 15.5 (1990); VT. RULE EVID. 807(d) (Supp. 1990); WIS. STAT. ANN. §§ 967.04(7)-(10) (West Supp. 1989); WYO. STAT. § 7-11-408 (1987); *Craig*, 110 S. Ct. at 3167-68.

16. The Supreme Court has ruled that broadcasting testimony over closed circuit television is not "out-of-court," hence, not hearsay. *Craig*, 110 S. Ct. at 3167. While presenting videotaped testimony rather than a live broadcast over closed circuit television might more logically be classified as hearsay, most state courts consider a videotaped deposition that mirrors trial proceedings to be the functional equivalent of live testimony. See, e.g., *State v. Thomas*, 150 Wis. 2d 374, 391-92, 442 N.W.2d 10, 12-19 (stating videotaped testimony is the "functional equivalent to live in-court testimony"), *cert. denied*, 110 S. Ct. 188 (1989); *State v. Jarzbek*, 204 Conn. 683, 697, 529 A.2d 1245, 1252 (1987) (same), *cert. denied*, 484 U.S. 1061 (1988). But see *State v. Johnson*, 240 Kan. 326, 329, 729 P.2d 1169, 1173 (1986) ("[V]ideotaped testimony is hearsay."), *cert. denied*, 481 U.S. 1071 (1987). For purposes of this Note, statutes that create provisions for closed circuit television broadcasts will not be distinguished from those which allow videotaped depositions, unless there is a substantial reason to do so.

17. Wallace J. Mlyniec & Michelle M. Dally, *See No Evil? Can Insulation of Child Sexual Abuse Victims Be Accomplished Without Endangering the Defendant's Constitutional Rights?*, 40 U. MIAMI L. REV. 115, 125 (1985).

18. See Ellen Forman, Note, *To Keep the Balance True: The Case of Coy v. Iowa*, 40 HASTINGS L.J. 437, 437-38 (1989). The group of statutes in the second category will be referred to as "child shield" laws and the testimony given under such statutes as "televised testimony." There is a third group of statutes which allows the use of an *ex parte* videotape statement on the condition that the child is later available in court and subject to cross-examination. These videotape statements, however, are more logically viewed as a form of hearsay and are beyond the scope of this Note.

19. U.S. CONST. amend. VI states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

The United States Supreme Court decision in *Globe Newspaper Co. v. Superior Court*²⁰ is a leading case legitimizing the concept that children involved in sex abuse prosecutions may be entitled to special protection. *Globe* permitted trial courts to close criminal trials to the press and the public if the court makes a particularized finding that closing the courtroom is "necessary to protect the welfare" of the child.²¹ The *Globe* Court found that the state's interest in protecting "'minor victims of certain sex crimes from public degradation, humiliation, demoralization, and psychological damage'"²² is a compelling one. While *Globe* remedies one source of trauma—the prospect of speaking about such intimate matters in open court—it does not assuage the trauma of face-to-face confrontation with the accused.²³ But neither does the *Globe* ruling infringe upon the right to face-to-face confrontation.²⁴

The use by states of the now popular child shield laws represents an infringement of a defendant's right to confront his accusers at trial. In implementing these statutes, courts must balance this long-standing right against the avowed need to protect children and bring wrongdoers to justice.²⁵ While there is purportedly unanimous concern for the child, at issue is the extent to which the court may deprive criminal defendants of the right to face their accusers at trial.²⁶

In *Maryland v. Craig*,²⁷ the Supreme Court endorsed a procedure that struck the balance in favor of protecting the child in child sex abuse cases. *Craig* creates an exception to the Sixth Amendment's Confrontation Clause. This exception establishes a class of witnesses—child sex abuse victims—

20. 457 U.S. 596 (1982).

21. *Id.* at 608.

22. *Id.* at 607 n.18 (quoting *Globe Newspaper Co. v. Superior Court*, 383 Mass. 838, 848, 423 N.E.2d 773, 779 (1981)).

23. See Note, *supra* note 3, at 813, 826.

24. Arguably, *Globe* may impinge on another Sixth Amendment right, the right to a public trial. U.S. CONST. amend. VI. The amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." *Id.*

25. See, e.g., *State v. Andrews*, 447 N.W.2d 118, 122-23 (Iowa 1989) (holding a child's unresponsive testimony at trial, absent showing that unresponsiveness was caused by fear of defendant, did not in itself justify use of prior videotaped testimony); *Commonwealth v. Bergstrom*, 402 Mass. 534, 544-46, 524 N.E.2d 366, 373 (1988) (ruling that unless a child victim is unavailable, use of televised testimony is an unjustified infringement on the defendant's right to physical confrontation); *State v. Sheppard*, 197 N.J. Super. 411, 431, 484 A.2d 1330, 1342 (1984) (stating considerations of trauma to child "must be weighed and balanced against the right of confrontation in child abuse cases"). But see *State v. Hoversten*, 437 N.W.2d 240, 242 (Iowa) (finding evidence that child had been the victim of "horrendous and painful abuse by someone" justified dispensing with defendant's right to face-to-face confrontation), *cert. denied*, 110 S. Ct. 212 (1989).

26. See generally Mlyniec & Dally, *supra* note 17.

27. 110 S. Ct. 3157 (1990).

who may testify at trial while avoiding face-to-face confrontation with their alleged abusers.²⁸ The *Craig* exception allows the child victim to give televised testimony outside the presence of the defendant if the trial court determines that confronting the defendant would so traumatize the child that he could not "reasonably communicate."²⁹

Sandra Ann Craig, a day care provider, was convicted by a Maryland court of sexually abusing children enrolled in her pre-school.³⁰ Prior to trial, the prosecution requested a statutory procedure allowing the use of one-way closed circuit television for the presentation of the testimony of child sex abuse victims.³¹ In a pre-trial hearing, expert witnesses testified that the children would have difficulty testifying in the presence of the accused.³² Based on the testimony of the experts, the trial court determined, as required by statute, that testifying in the presence of the defendant would cause the child witnesses such emotional distress that the children could not reasonably communicate.³³ A jury convicted Craig, and the Maryland Court of Special Appeals affirmed.³⁴ The Maryland Court of Appeals reversed, concluding that the state's evidence of need was insufficient to warrant denial of the defendant's confrontation right.³⁵ The United States Supreme Court granted certiorari and ultimately vacated the decision of the Maryland Court of Appeals.³⁶

In the majority's opinion, a state may use a special procedure designed to shield children from viewing their alleged abusers at trial if necessary to prevent trauma to the child and to ensure the accuracy of the child's testimony.³⁷ Thus, Maryland's statutory provisions, which allowed the use of the special procedure only when the court found that testifying in the pres-

28. *Id.* at 3169.

29. *Id.*

30. *Id.* at 3160.

31. MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1) (1989) provides:

(a)(1) In a case of abuse of a child as defined in § 5-701 of the Family Law Article or Article 27, § 35A of the Code, a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of closed circuit television if:

(i) The testimony is taken during the proceeding; and

(ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.

32. *Craig*, 110 S. Ct. at 3161.

33. *Id.* at 3162.

34. *Id.*

35. *Id.*

36. *Id.* at 3162, 3171.

37. *Id.* at 3169.

ence of the defendant would render a child unable to communicate reasonably, passed constitutional muster.³⁸

The dissent, led by Justice Scalia, protested vigorously. Justice Scalia argued that such an infringement of the confrontation right is "explicitly forbidden" by the Constitution.³⁹ Justice Scalia further argued that, generally, exceptions to the hearsay rule hinge on a finding that the witness is unavailable at trial.⁴⁰ The majority's ruling, he asserted, would allow a child to be excused from testifying in the presence of the defendant simply because the child was "unwilling" to testify in this manner, an unprecedented result.⁴¹

This Note surveys state laws and judicial decisions permitting victims of child abuse to testify via closed circuit television or videotaped depositions in lieu of live testimony and analyzes the impact of *Maryland v. Craig* on these laws. This Note then discusses the United States Supreme Court's rationale in *Craig* for creating this new exception to the Confrontation Clause and the effect it may have on the rights of criminal defendants. This Note will conclude that this exception to the Confrontation Clause is a creature of public policy which may overreach its limited purpose of protecting children from trauma. Finally, this Note argues that *Craig* leaves unanswered many important questions about the level of evidence needed to invoke this exception and the characteristics of the class entitled to its protection.

I. CHILD SHIELD LAWS IN THE STATES AND THE CONFRONTATION CLAUSE: BEFORE *COY v. IOWA*

A. Confrontation Clause

The central purpose of the Confrontation Clause is to require an adverse witness physically to confront the accused in a criminal trial with the evidence against him.⁴² The Confrontation Clause also provides parties with

38. *Id.* at 3170.

39. *Id.* at 3174 (Scalia, J., dissenting).

40. *Id.*

41. *Id.*

42. *Mattox v. United States*, 156 U.S. 237 (1895), described the importance of physical confrontation, as well as cross-examination, to the confrontation right:

The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of *compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.*

Id. at 242-43 (emphasis added).

Later, the Supreme Court underscored the dual purpose of the Confrontation Clause. See, e.g., *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) (finding "[t]he Confrontation Clause pro-

the opportunity to elicit testimony under oath, to cross-examine adverse witnesses, and enables the jury to observe and test the credibility of the witness.⁴³ The Supreme Court has held that the Confrontation Clause requires that adverse witnesses appear at trial to be examined by the prosecution in the presence of the accused and to face the defendant for cross-examination.⁴⁴ This right is not "absolute,"⁴⁵ but there is a "preference for face-to-face confrontation at trial,"⁴⁶ which "must occasionally give way to considerations of public policy and the necessities of the case."⁴⁷ Thus, the courts have created a number of exceptions to the right to confrontation.⁴⁸ The exceptions mainly allow into evidence out-of-court statements or hearsay, in which there is no possibility of in-court confrontation.⁴⁹

In *Ohio v. Roberts*,⁵⁰ the Court established a two-prong test for determining exceptions to the confrontation right. In *Roberts*, a witness testified at a preliminary hearing against a defendant accused of check forgery and possession of stolen credit cards; the witness subsequently disappeared and could not be located at the time of trial.⁵¹ Following the prosecution's good faith effort to locate the witness,⁵² the trial court allowed the use of the preliminary hearing transcripts and the defendant was convicted.⁵³ The Ohio

vides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination").

43. *California v. Green*, 399 U.S. 149, 158-60 (1970); see Owen, *supra* note 10, at 1516-17.

44. See *United States v. Benfield*, 593 F.2d 815, 821 (8th Cir. 1979). The court did not permit the use of videotaped testimony of an adult woman, stating that "[n]ormally the right of confrontation includes a face-to-face meeting at trial at which time cross-examination takes place." See also Graham, *supra* note 1, at 66.

45. See, e.g., *Maryland v. Craig*, 110 S. Ct. 3157, 3163 (1990).

46. *Ohio v. Roberts*, 448 U.S. 56, 63 (1980).

47. *Mattox v. United States*, 156 U.S. 237, 243 (1895).

48. See, e.g., FED. R. EVID. 803(1) (present sense impression); FED. R. EVID. 803(2) (excited utterance); FED. R. EVID. 803(3) (then existing mental, emotional, or physical condition). These traditional hearsay exceptions do not require that the declarant be unavailable to testify. Michael H. Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523, 527-28 (1988). Other hearsay exceptions, such as FED. R. EVID. 804(b)(1) (former testimony), require that the declarant be unavailable to testify at trial. See also Graham, *supra*, at 549.

49. See, e.g., FED. R. EVID. 804(b)(1) (former testimony); FED. R. EVID. 804(b)(2) (statement under belief of impending death); FED. R. EVID. 804(b)(3) (statements against interest); FED. R. EVID. 804(b)(4) (statement of personal or family history). The scope of the Confrontation Clause, however, is broader than hearsay. See *California v. Green*, 399 U.S. 149, 155 (1970); see also Graham, *supra* note 48, at 524 (noting the Supreme Court "has . . . stated that the confrontation clause is not a codification of the hearsay rule").

50. 448 U.S. 56 (1980).

51. *Id.* at 58-59.

52. *Id.* at 59.

53. *Id.* at 60.

Court of Appeals reversed and the Supreme Court of Ohio affirmed.⁵⁴ Following a grant of certiorari, the United States Supreme Court concluded that the trial court correctly allowed the use of the hearing transcript.⁵⁵ The Court stated that two elements are necessary to satisfy the exceptions to the Confrontation Clause. First, the proponent of the evidence must establish the unavailability of the declarant.⁵⁶ Second, the evidence must have "adequate indicia of reliability."⁵⁷ If the evidence fits a "firmly rooted" exception,⁵⁸ the court can infer reliability.⁵⁹ "[P]articulized guarantees of trustworthiness" must be established for all other exceptions.⁶⁰ In this case, the Court found that the prosecution had earnestly tried and failed to locate the witness, and had demonstrated that she was unavailable to testify.⁶¹ Further, the Court stated that the testimony was reliable because the defense attorney had cross-examined the absent witness at the hearing.⁶²

The *Roberts* standard has been adopted by a few states as an appropriate framework for balancing the need to protect children against the confrontation rights of criminal defendants.⁶³ Unfortunately, many states have adopted a lesser standard and a few have presumed that the harm to the child in confronting the accused automatically outweighs any damage to the confrontation rights of the accused.⁶⁴

54. *Id.* The Ohio Court of Appeals reversed on the grounds that the State failed to meet its burden of demonstrating that it attempted to locate the witness. The Supreme Court of Ohio affirmed, however, because "the mere opportunity to cross-examine at a preliminary hearing did not afford constitutional confrontation for purposes of trial." *Id.* at 61.

55. *Id.* at 77.

56. "In the usual case . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." *Id.* at 65. In child abuse prosecutions, "unavailability" may include "incompetence, . . . the danger of severe psychological injury to a child victim from testifying, and an unwillingness or inability to testify." Graham, *supra* note 48, at 554.

57. *Roberts*, 448 U.S. at 66.

58. *Id.* An example of a "firmly rooted exception" is a "dying declaration." Dying declarations "are considered trustworthy" against the accused in a homicide case. Glen Weisenberger, *FEDERAL RULES OF EVIDENCE, RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY* § 804.17 (1987).

59. *Roberts*, 448 U.S. at 66.

60. *Id.* For example, in *Bourjaily v. United States*, 483 U.S. 171 (1987), the Supreme Court found that the exception for co-conspirator's statements was firmly rooted "enough" so that the Court did not have to make an independent evaluation of the statement's reliability. *Id.* at 183.

61. *Roberts*, 448 U.S. at 75. "The law does not require the doing of a futile act." *Id.* at 74.

62. *Id.* at 70-71.

63. See, e.g., *Wildermuth v. State*, 310 Md. 496, 530 A.2d 275 (1987); *infra* notes 115-24 and accompanying text.

64. See, e.g., *State v. Hoversten*, 437 N.W.2d 240, 241-42 (Iowa) (upholding use of one-way mirror because protecting delicate emotional condition of child witness is an important

*Globe Newspaper Co. v. Superior Court*⁶⁵ offered support for the idea that child sex abuse victims deserve special treatment at trial and that the needs of children can sometimes justify the infringement of a constitutional right. In *Globe*, the United States Supreme Court ruled that trial courts may close trials to the press and the public if the court makes a particularized finding that this is necessary to protect the child—an act which necessarily limits the news media's exercise of their First Amendment rights.⁶⁶

B. *The Presumption of Harm to the Child*

The test created in *Ohio v. Roberts* provided some guidance for determining the validity of Confrontation Clause exceptions. Nonetheless, some states attempting to shield children from their alleged abusers have cast aside the *Roberts* framework, creating standards that allow the use of televised testimony. These standards presume that the needs of child sex abuse victims always outweigh the rights of the defendant.

The states adopting this "presumptive" view allow the blanket admission of televised testimony taken outside the presence of the defendant if the witness testifying is a child sex abuse victim below a statutory minimum age.⁶⁷ State supreme courts have upheld such laws based upon the presumption that all young children, regardless of their individual circumstances and characteristics, need protection from the trauma of testifying in court.⁶⁸ For example, in *State v. Cooper*,⁶⁹ the South Carolina Supreme Court accepted the legislative presumption in the state's shield statute that all young children needed such protection and concluded that the face-to-face requirement of the Confrontation Clause would be satisfied by cross-examination outside the defendant's presence.⁷⁰

public policy), *cert. denied*, 110 S. Ct. 212 (1989); *State v. Cooper*, 291 S.C. 351, 356, 353 S.E.2d 451, 454 (1987) (upholding use of videotaped testimony of three-year-old child because child sex abuse victims need special consideration).

65. 457 U.S. 596 (1982).

66. *Id.* at 607-09.

67. See, e.g., IOWA CODE § 910A.14 (1989) (allowing the child abuse victim to testify through closed circuit television at the discretion of the trial judge); KY. REV. STAT. ANN. § 421.350 (Michie/Bobbs-Merrill Supp. 1990) (allowing the use of television cameras to present the testimony of a child abuse victim under the age of 12 at the discretion of the trial judge).

68. See, e.g., *State v. Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330 (1984). In *Sheppard*, the court allowed the use of video equipment in the prosecution of a man for sexually abusing his ten-year-old stepdaughter. The court was concerned with the possibility of further harm inflicted on child witnesses by the judicial process and reasoned that "[c]hildren who are pre-vailed upon to testify may be more damaged by their traumatic role in the court proceedings than they were by their abuse." *Id.* at 431, 484 A.2d at 1342.

69. 291 S.C. 351, 353 S.E.2d 451 (1987).

70. *Id.* at 356, 353 S.E.2d at 454.

Other courts base their tests on the presumption that the trauma induced by facing the defendant in the courtroom undermines a child's truthfulness, a result which justifies dispensing with face-to-face encounters.⁷¹ Courts have also presumed that the very nature of sexual abuse indicates truthfulness in child testimony, for it is inconceivable that small children could fabricate the particulars of an assault.⁷² The Kansas Supreme Court expressed the presumption in favor of a child's veracity in *State v. Myatt*.⁷³ *Myatt* involved the interpretation of a statute creating a hearsay exception for child sex abuse victims.⁷⁴ In *Myatt*, a six-year-old girl was diagnosed with gonorrhea.⁷⁵ She told a social worker and a police officer that her mother's boyfriend had touched her in the genital area.⁷⁶ The trial court allowed the social worker and the police officer to testify about the child's statements. Partially on the basis of this testimony, the defendant was convicted of child molestation.⁷⁷ Because children are not likely to lie to their parents or other authority figures about sexual abuse, the court found a child's testimony concerning sexual abuse to be inherently reliable.⁷⁸ Moreover, the court held that children lack the requisite knowledge to fabricate about such matters.⁷⁹

While the *Myatt* court addressed the validity of a hearsay exception for child sex abuse victims, the presumption in favor of a child's truthfulness applies equally to televised testimony. Under the presumptive view, if the prosecution wishes to invoke the child shield statute, a criminal defendant in

71. See, e.g., *State v. Chisholm*, 243 Kan. 270, 755 P.2d 547, *vacated*, 488 U.S. 962 (1988). The Kansas Supreme Court upheld the sex abuse conviction of a man accused of sexually abusing his eight-year-old stepdaughter. *Id.* at 276, 755 P.2d at 551. Her testimony was given via one-way closed circuit television pursuant to the Kansas child shield law. *Id.* at 271, 755 P.2d at 550. The court held that the statute had been "wisely" enacted by the state legislature as "the best means by which the truth could be ascertained" from children. *Id.* at 274, 755 P.2d at 550. The court reasoned that while physical confrontation "encourages the truth in an adult witness. . . it is more likely to inspire terror, trauma, and speechlessness in a small child." *Id.*

72. The assumption in the 1990s is "that children who allege sexual abuse must be believed." Feher, *supra* note 5, at 234. This is a complete reversal of an earlier rule that children who make such charges should not be believed. *Id.* While agreeing that children do not "lie," some researchers suggest that a child, in striving to please or accommodate adults, may adopt a story as true that is different from what actually occurred. *Id.* at 236-38.

73. 237 Kan. 17, 697 P.2d 836 (1985).

74. *Id.* at 19, 697 P.2d at 839.

75. *Id.*

76. *Id.*

77. *Id.*, 697 P.2d at 840.

78. *Id.* at 22, 697 P.2d at 840.

79. *Id.*, 697 P.2d at 841.

a child sex abuse case can never demand the right to confront his accusers.⁸⁰ The criminal defendant's rights are thus automatically subservient to his alleged victim's.

C. *The Requirement that Some Harm be Proved*

While some courts embraced the presumption that all children need protection from the trauma of testifying against the accused in open court,⁸¹ others determined that the mere presumption of harm is not sufficient to justify dispensing with the confrontation right.⁸² Instead, some require that a court determine that testifying in the presence of the defendant will either harm the child in some way or impede the judicial process. Absent such a finding, the use of a child shield procedure will not pass constitutional muster.⁸³ For example, the Kentucky Supreme Court, in interpreting its law giving trial judges total discretion to invoke the child shield statute,⁸⁴ inserted a minimal requirement that the use of a child shield law be "reasonably necessary" to protect child victims from trauma.⁸⁵ In *Commonwealth v. Willis*,⁸⁶ the court upheld the use of television cameras to present the testi-

80. *Cf. State v. Vess*, 157 Ariz. 236, 238, 756 P.2d 333, 335 (1988) (rejecting explicitly the notion that a child sex abuse victim should always be able to present televised testimony).

81. *See State v. Chisholm*, 243 Kan. 270, 755 P.2d 547, *vacated*, 488 U.S. 962 (1988); *State v. Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330 (1984).

82. *Graham*, *supra* note 48, at 559-60.

83. *See, e.g., State v. Davis*, 229 N.J. Super. 66, 74, 550 A.2d 1241, 1245 (1988) (requiring finding that the "witness would suffer severe emotional or mental distress"); *Glendening v. State*, 536 So. 2d 212, 218 (Fla. 1988) (requiring finding that the child would suffer "emotional or mental harm"), *cert. denied*, 492 U.S. 907 (1989); *People v. Cintron*, 75 N.Y.2d 249, 254, 551 N.E.2d 561, 564, 552 N.Y.S.2d 68, 71 (1990) (requiring the court to find that "child witness will suffer severe mental or emotional harm" (emphasis in original)).

84. KY. REV. STAT. ANN. § 421.350 (Michie/Bobbs-Merrill Supp. 1991) (declared unconstitutional on other grounds by *Gaines v. Commonwealth*, 728 S.W.2d 525 (Ky. 1987)). The statute at the time of trial read as follows:

The court may, on the motion of the attorney for any party, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding.

Id. at § 421.350(3).

85. *Commonwealth v. Willis*, 716 S.W.2d 224, 230-31 (Ky. 1986). Unlike the United States Constitution, the Kentucky State Constitution contains an explicit "face-to-face" requirement. *Id.* The trial court reasoned, however, that "[t]he choice of the words 'face to face' may have resulted from an inability to foresee technological developments permitting cross-examination and confrontation without physical presence," *i.e.*, television. *Id.* at 230. The dissent protested angrily that "[t]he majority has put the imprimatur of this Court on a new revision of the rule which says that the right of confrontation is no longer 'face to face,' but is rather, 'face—to television screen—to face'." *Id.* at 234.

86. 716 S.W.2d 224 (Ky. 1986).

mony of a five-year-old child abuse victim.⁸⁷ The court determined that the child's reluctance to testify in the presence of the accused and her failure to give specifics about the crime while in the defendant's presence justified use of the protective procedure and met the "reasonably necessary" standard.⁸⁸ The Kentucky Supreme Court reasoned that the legislature did not intend the traditional requirement of unavailability to be imposed on child sex abuse victims, otherwise it would not have provided this special statutory protection.⁸⁹

Courts adopting the *Willis* view recognize the need to balance the desire to protect children from harm against the possible harm to the defendant's right to confrontation.⁹⁰ But the competing interests are not equally weighted. For example, in the *Willis* court's view, the needs of the child are real and compelling, while the violation of the defendant's right is a mere technicality.⁹¹

D. The Requirement of Particularized Need

Other courts have required a stronger showing of particularized need before dispensing with the confrontation right.⁹² These courts have upheld child shield statutes only if the statute required a case by case evaluation of the needs of a particular child.⁹³

For example, in *State v. Vess*,⁹⁴ because there was no requirement of an individualized showing that the child needed to be protected, the Arizona Supreme Court held as unconstitutional an Arizona statute⁹⁵ allowing the use of televised testimony at the discretion of the trial judge.⁹⁶ The defendant in *Vess* was convicted of child molesting, sexual abuse, and furnishing obscene materials to a minor based on the victim's videotaped testimony

87. *Id.* at 231.

88. *Id.* at 230.

89. *Id.* The court concluded that construing the statute to require a showing of unavailability "would provide no further protection for child witnesses than was already available." *Id.* The court reasoned that the legislature did not intend to do a "vain act." *Id.*

90. *See supra* notes 81-89 and accompanying text.

91. *Willis*, 716 S.W.2d at 230-31.

92. *Supra* notes 50-64 and accompanying text.

93. *See, e.g., State v. Vess*, 157 Ariz. 236, 756 P.2d 333 (1988); *State v. Jarzbek*, 204 Conn. 683, 529 A.2d 1245 (1987), *cert. denied*, 484 U.S. 1061 (1988); *State v. Twist*, 528 A.2d 1250 (Me. 1987).

94. 157 Ariz. 236, 756 P.2d 333 (1988).

95. ARIZ. REV. STAT. ANN. § 13-4253 (1989). The statute provides: "The court, on motion of the prosecution, may order that the testimony of the minor be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding." *Id.*

96. *Vess*, 157 Ariz. at 238, 756 P.2d at 335.

taken in conformance with the state's child shield statute.⁹⁷ While the court indicated that such testimony may be constitutional if there is a showing that a particular child would be either traumatized or unable to communicate in the presence of the defendant,⁹⁸ the court refused to sanction the creation of a class of witnesses who need not testify before the jury if the prosecutor does not want them to, regardless of whether the prosecution has demonstrated a need for such a procedure.⁹⁹

On the other hand, statutes requiring the court to find that a particular child needs to present televised testimony can result in the court sustaining the statute. In *State v. Twist*,¹⁰⁰ the Maine Supreme Court upheld the state's child shield statute,¹⁰¹ which set a standard requiring the court to "expressly find[] that the emotional or psychological well-being of the person would be substantially impaired if the person were to testify at trial."¹⁰² In *Twist*, two child victims presented videotaped testimony¹⁰³ pursuant to Maine's child shield statute,¹⁰⁴ which resulted in the conviction of Elwood Twist for rape and unlawful sexual contact.¹⁰⁵ The Maine Supreme Court found that the statutory standard justified dispensing with face-to-face confrontation because it "advanced the important public policy of protecting the emotional and psychological well-being of young children."¹⁰⁶

97. *Id.* at 237-38, 756 P.2d at 333-34.

98. *Id.* at 238, 756 P.2d at 335.

99. *Id.* at 237, 756 P.2d at 334.

100. 528 A.2d 1250 (Me. 1987).

101. *Id.* at 1253 & n.4 (quoting 15 ME. REV. STAT. ANN. tit. 15, § 1205 (West Supp. 1984)). Unlike the majority of state statutes, the Maine law classified videotaped testimony as hearsay. *Id.* In 1985, the Maine legislature repealed and replaced subsections 1 and 2 quoted below; however, at the time of trial, the statute read as follows:

A hearsay statement made by a person under the age of 14 years, describing any incident involving sexual intercourse, a sexual act or sexual contact . . . shall not be excluded as evidence in criminal proceedings in courts of this State if:

1. Emotional or psychological well-being of a person. On motion of the prosecution and in camera hearing, the court expressly finds that the emotional or psychological well-being of the person would be substantially impaired if the person were to testify at trial; and

2. Examination and cross-examination. . . . the statement is made under oath, the defendant has been given the same rights in regard to the examination and cross-examination of the person as if the person were testifying in open court, and the statement has been recorded stenographically or on videotape or by another means approved by the court.

Id.

102. *Id.* at 1253 n.4.

103. *Id.* at 1251.

104. 15 ME. REV. STAT. ANN. tit. 15, § 1205 (West 1964 & Supp. 1984).

105. *Twist*, 528 A.2d at 1251.

106. *Id.* at 1256.

Using a more restrictive analysis than the *Twist* court, the Connecticut Supreme Court, in *State v. Jarzbek*,¹⁰⁷ upheld the state's statute providing that a child sex abuse victim under the age of twelve may be permitted to present videotaped testimony.¹⁰⁸ The court, however, rejected a "per se rule" that "protecting the well-being of children" alone justifies infringement of a defendant's confrontation rights.¹⁰⁹ The defendant in *Jarzbek* was convicted of sexually abusing his five-year-old daughter.¹¹⁰ Her testimony was videotaped following a pre-trial hearing in which the state presented testimony of two clinical psychologists who testified that the child would be traumatized if called upon to testify in the presence of the defendant.¹¹¹ The court concluded that the state had failed to justify the use of televised testimony.¹¹² Absent a compelling need, the defendant's right to "eyeball-to-eyeball" confrontation cannot be eliminated.¹¹³ The court mandated a case-by-case analysis,¹¹⁴ whereby the state would be required to establish a compelling need to allow the child witness to testify outside the presence of the defendant.¹¹⁵ This compelling need could be established if the trial court determines that physical confrontation would make a child less likely to testify truthfully, thus undermining the truth-enhancing function of the Confrontation Clause.¹¹⁶

Similarly, the Maryland Court of Appeals, in *Wildermuth v. State*,¹¹⁷ struck down the conviction of a man accused of sexually abusing his nine-year-old daughter because she testified via closed circuit television.¹¹⁸ The court held that the evidence did not support a finding that the child would suffer such emotional harm that she would be unable to reasonably communicate.¹¹⁹ Maryland's child shield statute explicitly requires that the trial

107. 204 Conn. 683, 529 A.2d 1245 (1987), cert. denied, 484 U.S. 1061 (1988).

108. *Id.*

109. *Id.* at 702-03, 529 A.2d at 1254. The court rejected the generalization that "children are uniquely vulnerable witnesses who must be treated more delicately than adult witnesses in order to protect their psychological and emotional well-being." *Id.*

110. *Id.* at 685-87, 529 A.2d at 1245-47.

111. *Id.* at 685, 529 A.2d at 1246.

112. *Id.* at 694, 529 A.2d at 1250.

113. *Id.*

114. *Id.* at 704, 529 A.2d at 1255.

115. *Id.*

116. *Id.* The court's analysis focused on the truth-enhancing properties of physical confrontation. "[P]hysical confrontation contributes significantly, albeit intangibly, to the truth-seeking process." *Id.* at 695, 529 A.2d at 1251. The court was also concerned about the effect of the televised procedures on the "defendant's dignity and the presumption that he is innocent until proven guilty." *Id.*

117. 310 Md. 496, 530 A.2d 275 (1987).

118. *Id.* at 502-04, 530 A.2d at 278-80.

119. *Id.* at 523-25, 530 A.2d at 288-89.

court make such a finding.¹²⁰ In overturning the conviction, the *Wildermuth* court adopted the traditional standards of admissibility laid down in *Ohio v. Roberts*.¹²¹ The court held that both the necessity of admitting the evidence and the reliability of the testimony were applicable to child testimony.¹²² The court concluded that "cross-examination, testimony under oath, ability of judge, jury, and accused to view the witness during the testimony," even if only through a television screen, satisfied the reliability requirement.¹²³ The court further held that a finding that the child cannot reasonably communicate "is tantamount to a finding of unavailability in the *Roberts* sense, and meets the necessity prong."¹²⁴ Unavailability cannot be established by "mere nervousness or excitement or some reluctance to testify" in the particular child involved,¹²⁵ but by an inability to "reasonably communicate" at trial.¹²⁶

Under the *Wildermuth* and *Jarzbek* holdings, the right to physical confrontation has significantly greater weight when measured against the need to protect child sex abuse victims from trauma.¹²⁷ Televised testimony can only be used when it is justified by the possibility that significant harm to the particular child involved will undermine the judicial process.¹²⁸

E. The Right to Confrontation is Nearly Absolute

A handful of states do not permit the use of videotaped testimony if the child witness cannot see and be seen by the defendant. This requirement defeats the purpose of the child shield procedures discussed above.¹²⁹ The Massachusetts Supreme Court, for example, struck down a provision of the Massachusetts child shield statute that allowed the taking of testimony by

120. MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (1984 & Supp. 1986).

121. 448 U.S. 56 (1980).

122. *Wildermuth*, 310 Md. at 514-15, 530 A.2d at 284-85.

123. *Id.* at 515, 530 A.2d at 285.

124. *Id.* at 519, 530 A.2d at 286.

125. *Id.* at 524, 530 A.2d at 289. Embedded even in this more rigorous approach is a presumed need to protect child victims from courtroom trauma: "to force a child to give this sort of testimony, in open court, in the presence of the accused, may further traumatize the child." *Id.* at 516, 530 A.2d at 285.

126. *Id.* at 519, 530 A.2d at 286.

127. *Supra* notes 107-26 and accompanying text.

128. See, e.g., *State v. Jarzbek*, 204 Conn. 683, 704-05, 529 A.2d 1245, 1255 (1987), cert. denied, 484 U.S. 1061 (1988); *Wildermuth*, 310 Md. at 518, 530 A.2d at 286 (holding that "(un)availability" must be specific to the particular witness").

129. This process protects the child from the trauma of testifying in open court, but not from the trauma invoked by the presence of the defendant. See, e.g., *Commonwealth v. Bergstrom*, 402 Mass. 534, 552-53, 524 N.E.2d 366, 377-78 (1988) (striking portions of MASS. GEN. L. ch. 278, § 16D, allowing the taking of televised testimony outside the presence of the defendant).

videotape or closed-circuit television outside the presence of the defendant.¹³⁰ The Massachusetts statute allowed taping outside the presence of the defendant if the court found by a preponderance of evidence that facing the defendant in court would cause the child victim psychological or emotional trauma.¹³¹ In *Commonwealth v. Bergstrom*,¹³² the Massachusetts court held that this provision of the statute, on its face, violated the state constitution's explicit right to face-to-face confrontation.¹³³ As a result, the court overturned the conviction of a father for sexually abusing his two young daughters. The court also emphasized the importance of physical confrontation under the Federal Constitution.¹³⁴ The court argued that a witness's veracity is tested not only by cross-examination, but by meeting the defendant face-to-face at trial.¹³⁵ The court found that the exception for child sex abuse victims was both too broad and "crime specific"¹³⁶ because "no principled distinction can be drawn between a child witness and any other class whom the Legislature might in the future deem in need of special treatment."¹³⁷ Although the court found concerns about the difficulties an individual child may encounter in open court to be valid, it was not willing to dispense with face-to-face confrontation on that ground.¹³⁸ The court held that "[t]he right of the accused to be tried in the manner which our Constitution guarantees cannot dissolve under the pressures of changing social circumstance or societal focus."¹³⁹ While the court did not reject outright the use of videotaped testimony where it was necessary to "avoid severe and long lasting emotional trauma to the child,"¹⁴⁰ the court held that to satisfy

130. *Id.* at 552-54, 524 N.E.2d at 377-78.

131. MASS. ANN. LAWS ch. 278, § 16D (Law. Co-op. 1991). Alternative procedures may be used provided "the court finds by a preponderance of the evidence . . . that the child witness is likely to suffer psychological or emotional trauma as a result of testifying in open court, [and] as a result of testifying in the presence of the defendant." *Id.*

132. 402 Mass. 534, 524 N.E.2d 366 (1988).

133. Article 12 of the Massachusetts Constitution states that "every subject shall have a right to produce all proofs, that may be favorable to him; [and] to meet the witnesses against him face to face. . . ." MASS. CONST. pt. 1, art. XII (emphasis added). The *Bergstrom* court reasoned that "constitutional language more definitively guaranteeing the right to a direct confrontation between witness and accused is difficult to imagine." *Bergstrom*, 402 Mass. at 541-42, 524 N.E.2d at 371.

134. *Id.* at 542, 524 N.E.2d at 372.

135. *Id.*

136. *Id.* at 546-47, 524 N.E.2d at 374. "The recognized exceptions to the right of direct confrontation . . . apply impartially to all situations which the constitutional guarantee governs." *Id.* at 546, 524 N.E.2d at 374.

137. *Id.* at 546-47, 524 N.E.2d at 374.

138. *Id.* at 552-53, 524 N.E.2d at 377.

139. *Id.* at 553, 524 N.E.2d at 377.

140. *Id.* at 550-51, 524 N.E.2d at 376. The court was reluctant to allow the use of taped testimony under less than compelling circumstances, because televised testimony is not "the

the Sixth Amendment rights, the defendant must be present and visible to the witness at the taping of the testimony.¹⁴¹

By 1988, a majority of states had enacted a patchwork of child shield statutes, which permitted defendants varying degrees of protection from infringement of their confrontation rights. While the state courts were active in attempting to balance the use of televised testimony in child sex abuse prosecutions against the right of an accused to face his accuser at trial, the United States Supreme Court was silent. The Supreme Court attempted to end the differences between the states in *Coy v. Iowa*, but simply added to the confusion by sending a dual message.

II. THE SUPREME COURT SPEAKS: *COY V. IOWA*

In *Coy v. Iowa*,¹⁴² the United States Supreme Court addressed directly, for the first time, the states's use of procedures to shield child abuse victims from confronting their alleged abusers in the courtroom.¹⁴³ In *Coy*, the Court overturned a man's conviction of sexually molesting two thirteen-year-old girls because Iowa's child shield statute¹⁴⁴ allowed the girls to testify with a screen placed between them and the defendant that removed him from their view.¹⁴⁵ With the screen in place, the defendant, judge and jury could see the witnesses, but the witness could not see the defendant.¹⁴⁶

Writing for the majority, Justice Scalia rejected the screen method of protection, reasoning that a face-to-face meeting is "essential to a fair trial in a criminal prosecution."¹⁴⁷ Justice Scalia concluded that it would be "difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter" than screening the defendant from his ac-

equivalent of personal observation." *Id.* at 550, 524 N.E.2d at 376. "Especially where child witnesses are involved, and great leeway for leading questions is allowed, jurors must be able to choose their own focus in looking for any direct or indirect influences on a child's testimony." *Id.*

141. *Id.* at 551, 524 N.E.2d at 376.

142. 487 U.S. 1012 (1988).

143. An earlier case, *Kentucky v. Stincer*, 482 U.S. 730 (1987), concerned the right of a criminal defendant in a child sex abuse case. In *Stincer*, the Court addressed whether the defendant had a right to be present during the children's competency hearing. *Id.* at 732. The Court ruled that because the children were not asked any substantive questions about the crime during the competency hearing, and because the defendant "had the opportunity for full and effective cross-examination of the two witnesses during trial," the defendant's exclusion from the hearing did not violate his Sixth Amendment rights. *Id.* at 744. The Court did not consider the constitutionality of state laws that permit the accusers to testify and avoid physical confrontation at trial.

144. IOWA CODE ANN. § 910A.13 (West Supp. 1991).

145. *Coy v. Iowa*, 487 U.S. at 1014-15.

146. *Id.* at 1015.

147. *Id.* at 1017 (quoting *Pointer v. Texas*, 380 U.S. 400, 404 (1965)).

cusers.¹⁴⁸ According to Justice Scalia, the "legislatively imposed presumption of trauma" in the Iowa statute did not establish the necessity that might allow an exception to the literal meaning of the Confrontation Clause.¹⁴⁹

In contrast to Justice Scalia's strongly worded opinion, Justice O'Connor's concurring opinion suggested that a state law permitting a procedure that is "necessary to further [sic] an important public policy" and requiring a "case-specific finding of necessity" might justify an exception to the Confrontation Clause.¹⁵⁰

Coy invalidated state approaches relying on legislatively-imposed presumptions of trauma, but it did not automatically render such laws void. Justice O'Connor's concurrence established a framework for evaluating the constitutionality of child shield statutes. First, the statutes must further an important public policy; second, the court must make a case-specific finding of necessity before permitting the use of a child shield procedure.¹⁵¹

A. *The State Court's Rush to Protect Child Shield Statutes*

State courts acted to preserve their child shield laws within the *Coy v. Iowa*¹⁵² framework. Various state courts found that impaired truthfulness,¹⁵³ traumatization or harm to the child,¹⁵⁴ inability to communicate, or unavailability¹⁵⁵ satisfied the *Coy* requirement of necessity.

148. *Id.* at 1020.

149. *Id.* at 1021. Justice Scalia's opinion stressed the fundamental nature of the right to physical confrontation at trial. *Id.* at 1016. Pointing to *Kentucky v. Stincer*, Scalia maintained that the Court has "never doubted . . . that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Id.*

150. *Id.* at 1025 (O'Connor, J., concurring).

151. *Id.*

152. 487 U.S. 1012 (1988).

153. See, e.g., *State v. Bonello*, 210 Conn. 51, 554 A.2d 277, cert. denied, 490 U.S. 1082 (1989). The Connecticut Supreme Court's decision in *State v. Jarzbek*, 204 Conn. 683, 529 A.2d 1245 (1987), cert. denied, 484 U.S. 1061 (1988), preceded *Coy* and required that the trial court determine that testifying in the presence of the accused would cast serious doubt on the "trustworthiness and reliability" of the child witness. *Bonello*, 210 Conn. at 54, 554 A.2d at 279. The *Bonello* court concluded that *Jarzbek* standards were consistent with *Coy* because "the rationale of promoting the search for truth that underlies *Jarzbek* is identical to the concerns expressed . . . in *Coy*." *Id.* at 60, 554 A.2d at 282. The court went as far as to argue that *Jarzbek* "promote[s] rather than restrict[s] the sixth amendment's fundamental objective of establishing . . . the facts." *Id.*

154. See, e.g., *State v. Chisholm*, 245 Kan. 145, 777 P.2d 753 (1989). The court remanded to the trial court to make the "necessary individualized findings as to the probability, degree, and duration of psychological injury to the child" if the child testifies in court in the presence of the defendant. *Id.* at 152, 777 P.2d at 759.

155. See, e.g., *State v. Conklin*, 444 N.W.2d 268, 271 (Minn. 1989). The statute, MINN. STAT. § 595.02, subd. 4(c) (1988), allows a child witness to give testimony via videotape if the

In states with "presumptive" statutes, state supreme courts generally upheld the statutes by engrafting a requirement that the trial court make a particularized finding of necessity before invoking the statute.¹⁵⁶ For example, in *State v. Eaton*,¹⁵⁷ because the trial court allowed the use of closed circuit television absent a particularized finding of necessity, the Kansas Supreme Court overturned a child sex abuse conviction.¹⁵⁸ The court sustained the state law, however, provided a trial court first finds, by clear and convincing evidence, that testifying in the presence of the defendant rendered the child unable to communicate reasonably or unavailable to testify.¹⁵⁹

In light of *Coy*, the more restrictive Connecticut court reevaluated and reaffirmed its *Jarzbek* standards,¹⁶⁰ which had earlier imposed a necessity requirement onto its presumptive state law. State courts also upheld laws already requiring a particularized finding of necessity,¹⁶¹ as well as many pre-*Coy* decisions conforming to these statutes.¹⁶²

court determines that "the presence of the defendant during testimony . . . would psychologically traumatize the witness so as to render the witness unavailable to testify." *Id.*

156. See, e.g., *State v. Vincent*, 159 Ariz. 418, 768 P.2d 150 (1989) (overturning the conviction of first degree murder because defendant's six-year-old son and eight-year-old daughter provided videotaped testimony without individualized findings, but sustaining the state law if its application is limited to situations where there is an "individualized showing . . . that face-to-face testimony would so traumatize a child witness as to prevent the child from reasonably communicating"). *Id.* at 432, 768 P.2d at 164.

The Iowa Court itself glossed over the *Coy* decision and concluded that *Coy* permitted exceptions to face-to-face confrontation "when necessary to further an important public policy" and that "[p]rotection of child witnesses" was just such a policy meriting an exception. *State v. Hoversten*, 437 N.W.2d 240, 241 (Iowa) (citations omitted), *cert. denied*, 110 S. Ct. 212 (1989).

157. 244 Kan. 370, 769 P.2d 1157 (1989).

158. *Id.* at 378, 769 P.2d at 1162-63.

159. *Id.* at 384-85, 769 P.2d at 1167-68.

160. See *supra* notes 107-16 and accompanying text.

161. See, e.g., *State v. Spigarolo*, 210 Conn. 359, 367, 556 A.2d 112, 117, *cert. denied*, 110 S. Ct. 322 (1989); *State v. Jarzbek*, 210 Conn. 396, 401, 554 A.2d 1094, 1096 (1989); *State v. Bonello*, 210 Conn. 51, 58, 554 A.2d 277, 281, *cert. denied*, 490 U.S. 1082 (1989).

162. See, e.g., *State v. Murrell*, 393 S.E.2d 919, 922 (S.C. 1990) (upholding conviction for sexual assault of five-year-old because trial judge made "specific findings" of need before determining that child could provide videotaped testimony); *State v. Davis*, 229 N.J. Super. 66, 74, 550 A.2d 1241, 1245 (1988) (upholding conviction for sexually assaulting two boys, aged three and four, because trial court found that there was a "'substantial likelihood that the witness would suffer severe emotional or mental distress if required to testify in open court'" before allowing child victims to testify via closed-circuit television) (quoting N.J. STAT. ANN. § 2A:84A-32.4 (West Supp. 1989); *Glendening v. State*, 536 So. 2d 212, 218 (Fla. 1988) (upholding conviction for sexual battery of 3 1/2-year-old daughter because the trial court found that "use of videotaped testimony [was] necessary to prevent the child from suffering emotional or mental harm"), *cert. denied*, 492 U.S. 907 (1989). Cf. *People v. Cintron*, 75 N.Y.2d 249, 254, 551 N.E.2d 561, 564, 552 N.Y.S.2d 68, 71 (1990) (overturning conviction for sexu-

B. Coy Engenders Restrictions on Child Shield Laws in Some States

Responding to Justice Scalia's rejection of the Iowa child shield procedure, several states saw *Coy* as limiting the instances in which the child shield statute could be invoked, regardless of whether the trial court makes a particularized finding of necessity.¹⁶³ For example, the Maryland Court of Appeals further narrowed the circumstances enunciated earlier in *Wildermuth v. State*.¹⁶⁴ The court overturned a child care provider's conviction of sexually abusing her charges in *Craig v. State* even though the child's televised testimony had been provided in conformance with the Maryland child shield statute.¹⁶⁵ The court concluded that an "inquiry which looks generally to a child's inability to testify in open court [is] . . . too broad to satisfy the necessity requirement" of *Coy*.¹⁶⁶ Instead, the court must find specifically that it is the presence of the defendant that invokes the emotional distress that is preventing the child witness from "reasonably communicating."¹⁶⁷

Similarly, the Louisiana Supreme Court voided a portion of its statute as unconstitutional under *Coy*.¹⁶⁸ The Louisiana statute allowed a victim of child sex abuse under the age of fourteen to give testimony by closed circuit television with the defendant present, but behind a screen, so that the child could not hear or see the defendant.¹⁶⁹ The protective procedure could be used whenever "justice so requires" at the discretion of the trial judge.¹⁷⁰ In

ally assaulting four-year-old girl because trial judge's subjective impressions did not constitute clear and convincing evidence required by statute that "child witness will suffer severe mental or emotional harm" if made to testify in presence of defendant) (emphasis removed); *State v. Conklin*, 444 N.W.2d 268, 274 (Minn. 1989) (overturning conviction for sexual abuse of four-year-old because trial court's findings were insufficient to establish "that the particular witnesses is [sic] or would be psychologically traumatized").

163. See *infra* notes 164-74 and accompanying text.

164. 310 Md. 496, 530 A.2d 275 (1987); see *supra* notes 115-24 and accompanying text.

165. 316 Md. 551, 560 A.2d 1120 (1989), *vacated and remanded*, 110 S. Ct. 3157 (1990).

166. *Id.* at 564, 560 A.2d at 1126.

167. *Id.* at 566, 560 A.2d at 1127. A similar conclusion was reached in *State v. Conklin*, 444 N.W.2d 268 (Minn. 1989). In *Conklin*, the Minnesota Supreme Court overturned a child sex abuse conviction because the trial court had not determined that it was the presence of the defendant that traumatized the child before allowing the child to give televised testimony outside the presence of the defendant. *Id.* at 274.

168. LA. REV. STAT. ANN. § 15:283 (West 1990). The statute provides:

A. On its own motion or on the motion of the attorney for any party, a court may order when justice so requires that the testimony of a child under fourteen years of age who may have been physically or sexually abused be taken in a room other than the courtroom and be simultaneously televised by closed circuit television to the court and jury.

Id.

169. *Id.*

170. *Id.*

State v. Murphy,¹⁷¹ the Louisiana Supreme Court overturned the defendant's conviction for sexually abusing a four-year-old child because the Louisiana statute "contain[ed] at best a generalized legislative finding of the desirability of conferring special protection to child witnesses."¹⁷² Reasoning that the "non-specific" standard of "'when justice so requires' . . . clearly violates [the] defendant's constitutional right of confrontation under . . . *Coy*,"¹⁷³ the court invalidated the portion of the statute that required the child witness to be kept from seeing or hearing the defendant while giving televised testimony.¹⁷⁴

The *Coy* decision did not address other differences in state approaches to the implementation of child shield laws.¹⁷⁵ For example, some states that enacted child shield laws established age limits for child witnesses beyond which they are ineligible to invoke the protections of the statute.¹⁷⁶ These age limits vary from state to state.¹⁷⁷ In addition, the states have required, by statute or by judicial interpretation, that certain types of evidence be presented to establish the requisite need or harm to the child before permit-

171. 542 So. 2d 1373 (La. 1989).

172. *Id.* at 1376.

173. *Id.*

174. *Id.*

175. Glenn F. Lang, *To See or Not to See the Defendant: Expanding the Use of Florida's Special Procedures for Taking the Testimony of Witnesses*, 18 FLA. ST. U. L. REV. 321, 340, 434 (1991). Neither the majority nor the concurring opinions effectively guide the states on how to construct a constitutionally valid child shield statute. *Id.*

176. See, e.g., CONN. GEN. STAT. ANN. § 54-86g (West Supp. 1991); ILL. ANN. STAT. ch. 38, para. 106A (Smith-Hurd Supp. 1991); KAN. STAT. ANN. § 22-3434 (1988).

177. Statutes commonly preclude access to alternative methods of taking testimony after a child reaches age 12 or 13. See CONN. GEN. STAT. ANN. § 54-86g (West Supp. 1991) (12 or younger); ILL. ANN. STAT. ch. 38, para. 106A (Smith-Hurd Supp. 1991) (12 or younger); KAN. STAT. ANN. § 22-3434 (1988) (12 or younger); WIS. STAT. ANN. §§ 967.04(7)-(10) (West Supp. 1989) (under 12). At least one state sets the cut off point at less than ten years old. MINN. STAT. § 595.02 (1988). Others states's statutes shield "child" victims as old as 16 or 17. See, e.g., N.J. REV. STAT. § 2A:84A-32.4 (1990) (under 16); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1989) (17 or younger). In one state, South Carolina, the child shield statute can be invoked on behalf of a broad class of special witnesses, including the very young, the elderly or disabled persons. S.C. CODE ANN. § 16-3-1530(G) (Law. Co-op. 1985). This section of the South Carolina Code provides that:

VICTIMS AND WITNESSES WHO ARE VERY YOUNG, ELDERLY, WHO ARE HANDICAPPED OR WHO HAVE SPECIAL NEEDS, HAVE A RIGHT TO SPECIAL RECOGNITION AND ATTENTION BY ALL CRIMINAL JUSTICE, MEDICAL, AND SOCIAL SERVICE AGENCIES.

The court shall treat "special" witnesses sensitively, using closed or taped sessions when appropriate. The solicitor or defense shall notify the court when a victim or witness deserves special consideration.

Id.

ting the use of the protective procedures.¹⁷⁸ State courts analyze the quantum and type of evidence sufficient to support a finding of necessity in fundamentally different ways.¹⁷⁹ This burden cannot be reconciled from state to state.¹⁸⁰

178. See, e.g., CAL. PENAL. CODE § 1347(b)(2) (West Supp. 1991) (requiring that prosecution show by clear and convincing evidence that impact of testifying in presence of defendant would be "so substantial as to make the minor unavailable as a witness"); DEL. CODE ANN. tit. 11, § 3511 (1987) (allowing the videotaping of a child witness under 12 in criminal cases upon motion of the Attorney General and notice to defendant); IND. CODE ANN. § 35-37-4-6 (Burns Supp. 1990) (allowing videotaping of a child 14 or under in crimes involving physical and sexual abuse, kidnapping, rape, and deviant sexual conduct only if the court finds at a hearing that the child's statements are reliable and that the "substantial likelihood of emotional or mental harm" renders the child unavailable to testify).

179. See G. Russell Nuce, Comment, *Child Sexual Abuse: A New Decade for the Protection of Our Children?*, 39 EMORY L.J. 581, 595-96 (1990); Randal C. Shaffer, Comment, *Protecting the Innocent: Confrontation, Coy v. Iowa, and Televised Testimony in Child Sexual Abuse Cases*, 78 KY. L.J. 803, 811 (1989-90).

180. Shaffer, Comment, *supra* note 179, at 811-12 ("inconsistencies run rampant on the issues of the degree of potential trauma necessary and the method of proof required") (footnotes omitted).

Convictions have been overturned because a trial judge used a child shield procedure and relied solely on his own observation or failed to use expert witnesses. See *People v. Cintron*, 75 N.Y.2d 249, 253, 551 N.E.2d 561, 564, 552 N.Y.S.2d 68, 71 (1990). In *Cintron*, the four-year-old victim was called as a witness and was unable to testify on the stand in the presence of the defendant. Based on the trial judge's "'close' observation of the child during her two hours on the stand," the judge ordered her testimony taken via closed circuit television. *Id.* at 256-57, 551 N.E.2d at 566, 552 N.Y.S.2d at 73. The New York Court of Appeals reversed, saying that the determination that a child needs to provide testimony in this manner must "be based on something more than the disputed subjective impressions of the Trial Judge, no matter how sincere." *Id.* at 263, 551 N.E.2d at 570, 552 N.Y.S.2d at 77; see also *State v. Crandall*, 231 N.J. Super. 124, 555 A.2d 35 (1989), *rev'd*, 120 N.J. 649, 577 A.2d 483 (1990). In *Crandall*, the defense asked for expert psychological testimony, but the judge relied on the mother's testimony that the victim "'would clam up and say nothing' if she saw [the] defendant" in ordering the testimony of a seven-year-old child to be taken by closed circuit television. *Id.* at 128, 555 A.2d at 37. The court held that in New Jersey if the defense requests expert psychological testimony, it must be given, absent specific reasons, which must be stated on the record. *Id.* at 133, 555 A.2d at 39-40. The court remanded the case for an evidentiary hearing. *Id.* at 135, 555 A.2d at 40. After the United States Supreme Court's decision in *Maryland v. Craig*, 110 S. Ct. 3157 (1990), the New Jersey Supreme Court reversed, holding that expert testimony was not needed. *State v. Crandall*, 120 N.J. 649, 663, 577 A.2d 483, 490 (1990).

On the other hand, state courts have struck down convictions, in part because the judge failed to personally observe the child or because the judge relied mainly on nonexpert opinion witnesses. See, e.g., *Wildermuth v. State*, 310 Md. 496, 523, 530 A.2d 275, 289 (1987) (striking down conviction because expert testimony presented regarding need for nine-year-old girl to testify via closed circuit television not specific enough and the judge "never questioned or even observed the child"); cf. *State v. Spigarolo*, 210 Conn. 359, 370-74, 556 A.2d 112, 119-21 (holding the use of expert testimony not required when father and stepmother, who had ample opportunity to observe the child witnesses, testified that children would not testify truthfully if confronted with defendant), *cert. denied*, 110 S. Ct. 322 (1989). In one case, a state court upheld the use of televised testimony as proper based solely on the trial judge's *in camera* conversation with the child and her mother. See *State v. Cooper*, 291 S.C. 351, 353, 353

The *Coy* decision, particularly Justice O'Connor's concurring opinion, set some outer limits on the application of child shield statutes. It did not, however, address the issues of evidentiary requirements or age limitations. Despite the *Coy* majority's clear disapproval of such laws, state courts acted to preserve their statutes. Two years after *Coy*, the Supreme Court ruled on the constitutionality of the states' responses to *Coy* in *Maryland v. Craig*. Although *Craig* refined the constitutional limits of child shield statutes under *Coy*, it left many of the same questions unanswered.¹⁸¹

III. *MARYLAND V. CRAIG* SIMULTANEOUSLY LIMITS THE USE OF CHILD SHIELD PROCEDURES AND CREATES A NEW CONFRONTATION CLAUSE EXCEPTION

A. *The Majority View*

Justice O'Connor, the author of the concurring opinion in *Coy v. Iowa*,¹⁸² wrote the majority opinion in *Maryland v. Craig*.¹⁸³ *Craig* involved the Maryland child shield statute.¹⁸⁴ The Maryland statute allows the use of one-way closed circuit television to take the testimony of a child sex abuse victim, if the trial judge "determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate."¹⁸⁵ Under the statute, the defendant, along with the judge and jury, are present in the courtroom.¹⁸⁶ The child gives testimony via closed circuit television from a separate room and in the presence of the attorneys for both the defense and the state.¹⁸⁷ The child cannot see or hear the defendant but is subject to full cross-examination by the defendant's attorney.¹⁸⁸ In apparent conformance with the Maryland statute, before invoking the procedure, the trial court heard evidence from expert witnesses that the child victim "would suffer 'serious emotional distress such that [[he] could not] reasonably communicate,' if required to testify in the courtroom."¹⁸⁹

Justice O'Connor, writing for the majority, struck a balance in favor of protecting the child witness and against the right of physical confrontation.

S.E.2d 451, 452 (1987) (upholding televised testimony when the victim, a three-year-old, told the trial judge that she was afraid of the defendant).

181. See Lang, *supra* note 175, at 321.

182. 487 U.S. 1012 (1988).

183. 110 S. Ct. 3157 (1990).

184. MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1)(ii) (1989).

185. *Id.*

186. *Craig*, 110 S. Ct. at 3161.

187. *Id.*

188. *Id.*

189. *Id.* (quoting MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (a)(1)(ii)).

She refined the framework established by her concurring opinion in *Coy*.¹⁹⁰ The *Coy* majority opinion had stated that " 'the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.' " ¹⁹¹ Justice O'Connor in *Craig* stressed that this right is not absolute,¹⁹² but could be infringed when the court found it necessary to further an important public policy.¹⁹³ Justice O'Connor concluded that protecting the child sex abuse victims from physical and psychological harm is an important public policy that can outweigh a defendant's right to a face-to-face encounter.¹⁹⁴

Justice O'Connor found that in certain circumstances, non face-to-face confrontation is sufficiently reliable to serve the traditional function of the Sixth Amendment's confrontation right. Justice O'Connor argued that physical confrontation is but one aspect of the confrontation right.¹⁹⁵ The other elements include testimony under oath, cross-examination of the witness by defendant's counsel, and providing the judge or jury the opportunity to observe the demeanor of the witness.¹⁹⁶ All these elements together, according to Justice O'Connor, serve the purpose of "ensuring that evidence admitted against an accused is reliable and subject to . . . rigorous adversarial testing. . . ." ¹⁹⁷

Justice O'Connor indicated that the absence of face-to-face encounter does not, in itself, defeat the purposes of the Confrontation Clause. While Justice O'Connor recognized that the physical aspects of the confrontation right have "symbolic"¹⁹⁸ as well as practical value for testing the truth, she argued that physical confrontation in the courtroom is "not the *sine qua non* of the confrontation right."¹⁹⁹ Justice O'Connor supported this contention by citing the numerous hearsay exceptions to the Confrontation Clause.²⁰⁰

She argued that the exceptions to the right to confrontation indicate that no component of that right, including the face-to-face component, is absolute.²⁰¹ She found that the reliability prong of *Ohio v. Roberts* is satisfied if

190. *Coy v. Iowa*, 487 U.S. 1012, 1025 (1988).

191. *Craig*, 110 S. Ct. at 3162 (quoting *Coy*, 487 U.S. at 1016).

192. *Id.* at 3163.

193. *Id.*

194. *Id.* at 3167.

195. *Id.* at 3163-64.

196. *Id.* at 3163.

197. *Id.*

198. *Id.* at 3164.

199. *Id.*

200. *Id.* at 3164-65. Justice O'Connor, however, explicitly declined to hold that televised testimony is hearsay. *Id.* at 3167. "[T]he child witness' testimony may be said to be technically given out-of-court (though we do not so hold)." *Id.*

201. *Id.* at 3166.

the child witness is found to be competent, the child testifies under oath, the defendant has an opportunity for cross-examination during the child's testimony, and the judge, jury, and defendant are able to view the child via a video monitor.²⁰² The absence of any one of these elements, according to the majority, does not destroy a defendant's sixth amendment right.

Justice O'Connor dispensed with the unavailability prong of *Roberts*, by implicitly substituting a "necessary to further an important public policy" standard.²⁰³ Justice O'Connor did not offer a rationale for doing so.²⁰⁴ She simply argued that protecting the welfare of children is a sufficiently important public policy.²⁰⁵ The Court relied heavily on its earlier decision in *Globe Newspaper Co. v. Superior Court*²⁰⁶ to support its contention that the Supreme Court has recognized and supported legislation to protect the well-being of children in criminal trials.²⁰⁷ Justice O'Connor pointed out that a majority of states have enacted child shield laws, which "attests to the widespread belief" that shielding children is an important public policy.²⁰⁸ Justice O'Connor argued that the Maryland statute, for example, reflects public sentiment regarding the role of the state in guarding the well-being of children. She concluded that the Court would not scrutinize the judgment of the Maryland legislature, which recognized that protecting child abuse victims from the emotional trauma of courtroom confrontation was a state interest²⁰⁹ "sufficiently important to justify the use of a special procedure. . . ." ²¹⁰

Justice O'Connor also stated that the Sixth Amendment requires trial courts to make a finding of necessity before invoking the child shield procedure, and the Maryland statute at issue comported with this requirement.²¹¹ The *Craig* majority stressed that protection from generalized courtroom trauma is not sufficient to justify denial of face-to-face confrontation.²¹² Instead, the majority held that the trial court must demonstrate that the child

202. *Id.*

203. *Id.* at 3167-70. *Cf.* *Wildermuth v. State*, 310 Md. 496, 530 A.2d 275 (1987). The *Wildermuth* court and the *Craig* Court both evaluated "reliability" using the *Ohio v. Roberts* test. *Craig*, 110 S. Ct. at 3167; *Wildermuth*, 310 Md. at 514-16, 530 A.2d at 285. Only the *Wildermuth* court used *Roberts* to evaluate necessity, requiring a finding of necessity which is "tantamount to a finding of unavailability in the *Roberts* sense." *Id.* at 519, 530 A.2d at 286.

204. *Craig*, 110 S. Ct. at 3167-70.

205. *Id.* at 3167.

206. 457 U.S. 596 (1982); *supra* notes 20-24 and accompanying text.

207. *Craig*, 110 S. Ct. at 3167.

208. *Id.* at 3167-68.

209. *Id.* at 3168-69.

210. *Id.* at 3169.

211. *Id.*

212. *Id.*

witness would experience trauma in the physical presence of the defendant and not merely from the pressure of testifying in court.²¹³ In addition to direct causation between the child's trauma and the presence of the defendant, the trial court must be satisfied that the trauma is more than *de minimis*.²¹⁴ Justice O'Connor found that the Maryland statutory provision, requiring the trial court to find that the child witness would suffer "serious emotional distress such that the child cannot reasonably communicate," met the constitutional standard.²¹⁵ She did not hold, however, that the Maryland standard is the only, or the minimum standard. Indeed, Justice O'Connor hinted that there may be other, less stringent standards that would pass constitutional muster.²¹⁶

In addition, the majority required that the trial court hear evidence to determine whether the use of the procedure is necessary to guard the welfare of that particular child witness.²¹⁷ Justice O'Connor declined to set federal constitutional requirements for the quality of the evidence used by the trial court in making its case specific findings of necessity.²¹⁸ She refused to require the trial court to "explore less restrictive alternatives" or to "observe the children's behavior in the defendant's presence"²¹⁹ before invoking the procedure. She did not disallow a trial court's reaching its conclusion relying solely on expert testimony.²²⁰

With adequate safeguards of reliability²²¹ in place, Justice O'Connor concluded that providing testimony by one-way closed circuit television does not undermine the truth enhancing or symbolic purposes of the Confrontation Clause.²²² States may only use the procedure, however, after determin-

213. *Id.* This is the one issue upon which the Maryland Court of Appeals and the Supreme Court agreed. The Court of Appeals reversed the lower court decision in *Craig* because the trial judge did not make a specific finding that it was the presence of the defendant that triggered the child victim's trauma. *Craig v. State*, 316 Md. 551, 566, 560 A.2d 1120, 1127 (1989), *vacated and remanded*, 110 S. Ct. 3157 (1990). The Court of Appeals's other grounds for reversal included reliance on expert testimony, the judge's failure to observe personally the child victim in the presence of the defendant, and failure to attempt to use less restrictive procedures. *Craig*, 110 S. Ct. at 3170.

214. *Id.* at 3169. Justice O'Connor states that "more than 'mere nervousness or excitement or some reluctance to testify'" must be present to justify use of the exception. *Id.* (quoting *Wildermuth v. State*, 310 Md. 496, 524, 530 A.2d 275, 289 (1987)).

215. 110 S. Ct. at 3169 (quoting MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1)(ii)).

216. *Id.* Justice O'Connor wrote: "We need not decide the minimum showing of emotional trauma required for use of the special procedure. . . ." *Id.*

217. *Id.*

218. *Id.* at 3171.

219. *Id.*

220. *Id.*

221. *Id.* at 3166.

222. *Id.* at 3167.

ing that it is necessary to further the state's interest "in protecting children who are allegedly victims of child abuse from the trauma of testifying against the alleged perpetrator."²²³

B. *The Dissent*

The dissent, written by Justice Scalia,²²⁴ denounced the majority's failure to "sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion."²²⁵ The dissent first dismissed the majority's rationale that public support for the exception allowing child sex abuse victims to avoid confrontation justifies its creation.²²⁶ The dissent argued that the Constitution is meant to "protect against, rather than conform to" public opinion.²²⁷

Next, Justice Scalia pointed out that the plain meaning of the Confrontation Clause requires a face-to-face encounter,²²⁸ and that this encounter is not a dispensable element of the confrontation right.²²⁹ According to Justice Scalia, the majority opinion, while claiming to maintain its purpose of ensuring the reliability of evidence, eliminated the right of confrontation.²³⁰

While Justice Scalia agreed with the majority that exceptions to the Confrontation Clause do exist, he argued that the precedents for dispensing with direct physical confrontation stem from the necessity of accepting hearsay evidence from declarants who are unavailable at trial.²³¹ Therefore, the dissent characterized the majority's newly minted exception to the Confrontation Clause as "utterly unheard-of," because it allows a witness to appear at trial and still not confront the accused.²³² Justice Scalia argued that face-to-face confrontation of the accused by his accusers who testify at trial "is a constitutional right unqualifiedly guaranteed," not a mere preference.²³³ According to the dissent, the majority eliminated the right to physical confrontation as a constitutional protection.

Justice Scalia recognized that the majority attempted to draw support from traditional hearsay precedents to create an exception to the Confronta-

223. *Id.*

224. Justices Brennan, Marshall and Stevens joined the dissent.

225. 110 U.S. at 3171 (Scalia, J., dissenting).

226. *Id.* at 3171-72.

227. *Id.* at 3172.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 3173.

232. *Id.*

233. *Id.*

tion Clause that did not precisely "fit" into those traditional exceptions.²³⁴ He noted that, in general, exceptions to the Confrontation Clause hinge on a finding of unavailability of the witness.²³⁵ He also noted that other exceptions are allowed because the truth-bearing properties of the hearsay could not be replicated at trial.²³⁶ Justice Scalia objected to the result in *Craig* because it allowed a child to provide televised testimony who was not "unavailable" under *Roberts*.²³⁷ Justice Scalia argued that the standard in the Maryland statute should be interpreted to mean that the trauma actually makes it impossible for the child to communicate,²³⁸ not the majority's lesser standard of unable to communicate reasonably.²³⁹

While Justice Scalia acknowledged that convicting more child abusers is a laudable goal, he argued that protecting "innocent defendants accused of particularly heinous crimes" is equally worthy.²⁴⁰ Justice Scalia noted studies indicating that children are more vulnerable to suggestion than adults and less able to separate fantasy from reality.²⁴¹ Therefore, Justice Scalia argued that the guarantees of reliability are more important when children testify because there is greater risk that children may not testify accurately.²⁴² The requirement of face-to-face confrontation between the accused and his accuser is thus even more important as an additional means of promoting the truth.²⁴³

Finally, Justice Scalia argued that the majority's assessment of the relative interests of defendants and child witnesses does not comport with the text of the Constitution.²⁴⁴ While the Maryland procedure may be "virtually" con-

234. *Id.* at 3174.

235. *Id.*; see, e.g., FED. R. EVID. 804 for hearsay statements that require that the declarant be unavailable to testify, including former testimony. FED. R. EVID. 804(b)(1).

236. *Craig*, 110 S. Ct. at 3174. Justice Scalia cites the example of statements by a co-conspirator, which can be admitted even if the declarant is available to testify because the "effect cannot be replicated by live testimony" and their reliability is based on the circumstances under which they were originally uttered. *Id.*

237. *Id.*

238. *Id.* at 3174 n.1.

239. Justice Scalia maintained that the new exception articulates an essentially pro-prosecution policy, because the defendant loses his right to physical confrontation only when that physical confrontation would prevent a child witness from testifying against him. The exception allows prosecutors to call witnesses to testify who otherwise would not testify or who could not be effective at trial. *Id.* at 3174-75.

240. *Id.* at 3175.

241. *Id.* (citations omitted).

242. *Id.* Justice Scalia cited the "tragic" Scott County, Minnesota, investigation as an example of this "risk." *Id.* In that case, investigators charged 24 adults with abusing 37 children. Twenty-five children were placed in foster homes. Ultimately, all but one of the accused were found not guilty or had the charges dismissed. *Id.* (citing Feher, *supra* note 5, at 239-40).

243. *Id.*

244. *Id.* at 3176.

stitutional in that it gives the defendant everything that is required except physical confrontation, the dissent argued that it is not "actually" constitutional because it deprives the defendant of the very right vested by the Constitution.²⁴⁵

IV. *MARYLAND V. CRAIG*: GUIDANCE TO THE STATES, BUT WITH POTENTIAL FOR ABUSE

*Maryland v. Craig*²⁴⁶ generally upholds the validity of state laws that permit the use of televised testimony in child abuse cases where there is a legislatively or judicially imposed requirement of a particularized finding of necessity.²⁴⁷ In addition, under *Craig*, a trial court must specifically find that it is the presence of the defendant that triggers such trauma that the child is unable to communicate reasonably.²⁴⁸ Limited to its facts, *Craig* approves the use of one-way closed circuit television in child sex abuse prosecutions.²⁴⁹ It is almost certain that *Craig* will be read to apply to all televised testimony in child abuse cases.²⁵⁰

The *Craig* decision will have the least impact on the "strict" state laws²⁵¹ because these laws already embody the basic requirements of *Craig*.²⁵² For example, Maryland's necessity requirement, that the trauma of facing the defendant will render a child unable to communicate reasonably, meets the criteria articulated in *Craig*.²⁵³ A number of state courts already mandate a standard similar to the one approved in *Craig*.²⁵⁴ Moreover, because the

245. *Id.*

246. 110 S. Ct. 3157 (1990).

247. See The Supreme Court, 1989 Term Leading Cases, 104 HARV. L. REV. 129, 137 (1990) [hereinafter *Leading Cases*].

248. *Craig*, 110 S. Ct. at 3170.

249. *Id.* at 3171.

250. The majority opinion does not distinguish between state statutes allowing videotaping and those allowing closed circuit television. *Craig*, 110 S. Ct. at 3167. The Court's treatment of these two types of statutes indicates that the Court views these two methods as serving the same function and as engendering the same constitutional questions. *Id.* Similarly, state courts also view these different "shield" procedures as raising identical constitutional questions, as evidenced by their response to *Coy v. Iowa*, 487 U.S. 1012 (1988). See *supra* notes 156-62 and accompanying text. The *Coy* case involved the use of a one-way screen to block the witnesses' view of the defendant in open court; yet the rule was applied equally to statutes allowing the use of closed circuit television as well as to those allowing the use of videotaped testimony.

251. See, e.g., CONN. GEN. STAT. § 54-86g (1989); MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (1984 & Supp. 1986); *State v. Jarzbek*, 204 Conn. 683, 529 A.2d 1245 (1987), cert. denied, 484 U.S. 1061 (1988); *Wildermuth v. State*, 310 Md. 496, 530 A.2d 275 (1987).

252. See *supra* notes 153-54 and accompanying text.

253. See *supra* notes 117-20 and accompanying text.

254. See *supra* notes 153-54 and accompanying text. *Craig* may also have an impact on the few states that view videotaped and closed circuit television as hearsay and allow such testi-

Craig Court did not suggest the level of necessity as the minimum or the sole standard; it left open the possibility that other criteria might be acceptable for measuring an exception to the right to physical confrontation.²⁵⁵ For example, Connecticut's *Jarzbek*²⁵⁶ test, allowing televised testimony when confronting the accused would undermine the child witness's truthfulness, may well pass constitutional muster, because the standard requires an individualized finding of need and furthers the Confrontation Clause's goal of enhancing the truth.²⁵⁷ A bare statutory standard which allows a child victim to avoid physical confrontation if such an encounter would impair the emotional and psychological well-being of the child witness²⁵⁸ or cause trauma to the child,²⁵⁹ however, may not be sustained under a strict reading of *Craig* because these standards do not protect the truthseeking goals of the Confrontation Clause.²⁶⁰ Mirroring the states's response to *Coy*,²⁶¹ state courts will likely find that child shield laws pass constitutional muster if their application is limited to those specific situations where the presence of the defendant will have an effect on the child which is roughly equivalent to the *Craig* standard of inability to communicate reasonably.²⁶²

The requirement that the trial judge must find that it is the presence of the defendant which traumatizes the child, not simply the prospect of testifying in open court, will probably be the part of the *Craig* decision that will restrict state courts the most. Few state supreme courts have scrutinized the

mony under the state exception to the hearsay rules. The United States Supreme Court has distinguished exceptions to the hearsay rule from exceptions to the right to face-to-face confrontation in child sex abuse prosecutions. See *Idaho v. Wright*, 110 S. Ct. 3139 (1990) (finding that statutory exceptions to the hearsay rule will withstand constitutional challenge only if declarant is unavailable and particularized guarantees of trustworthiness are present). Exceptions to the hearsay rule that are not deeply rooted are still analyzed using the *Roberts* test, which requires a showing of unavailability. *Ohio v. Roberts*, 448 U.S. 56, 65 (1980). The effect of *Craig* on these laws is unclear; they may meet and exceed the *Craig* standard of availability. See, e.g., KAN. STAT. ANN. § 60-460(dd) (Supp. 1989) (requiring the trial judge to find that the child is unavailable or disqualified, that the child's statements appear to be reliable, and that the child was not induced or coerced to make the statements before admitting hearsay statements). On the other hand, the use of televised testimony is classified as an exception to the hearsay rule, a classification the *Craig* Court implicitly rejected. *Craig*, 110 S. Ct. at 3167.

255. *Craig*, 110 S. Ct. at 3169.

256. *State v. Jarzbek*, 204 Conn. 683, 529 A.2d 1245 (1987), cert. denied, 484 U.S. 1061 (1988).

257. *Id.* at 703-04, 529 A.2d at 1255.

258. See, e.g., *State v. Twist*, 528 A.2d 1250 (Me. 1987); *State v. Cooper*, 291 S.C. 351, 353 S.E.2d 451 (1987).

259. See, e.g., *State v. Davis*, 229 N.J. Super. 66, 74-75, 550 A.2d 1241, 1245 (1988); see also *supra* note 64.

260. *Maryland v. Craig*, 110 S. Ct. 3157, 3164 (1990).

261. See *supra* notes 153-59, 162 and accompanying text.

262. *Id.*

child shield statutes this closely; rather, they simply gloss over the distinction between courtroom-induced trauma and defendant-induced trauma.²⁶³ In addition, the *Craig* decision deliberately gives little guidance on the type of evidence needed to support this finding of necessity.²⁶⁴ Clearly, the taking of televised testimony must be supported by some evidence²⁶⁵ and the evidence must support a finding that the child will be traumatized by the defendant's presence.²⁶⁶ The requirement for hearing evidence means that a trial judge cannot rely solely on his own observations in allowing the use of televised testimony.²⁶⁷ In practice, the requirement that a judge issue findings will undoubtedly lead to an additional pre-trial procedure to determine the necessity of televised testimony.²⁶⁸ The absence of such a finding may result in reversals or remands of previously valid convictions to determine if the finding of necessity can be sustained in light of *Craig*.²⁶⁹

Part of the difficulty with the *Craig* opinion may be that it is driven by public opinion²⁷⁰ rather than a straightforward legal analysis of a constitutional right. It appears that the Court sought to find an exception to the Sixth Amendment's Confrontation Clause that would enable evidence to be proffered against sex abuse defendants while protecting the alleged victims from courtroom trauma. Yet, no exception existed and none could be easily extrapolated from current law. Thus, it seems that public policy concerns may have motivated the *Craig* majority to reject the *Roberts* test of necessity—unavailability.

The *Roberts* approach is more conservative than that of *Craig* and does not necessitate as great a departure from precedent.²⁷¹ Reasoning that the

263. See Leading Cases, *supra* note 247, at 137 n.70.

264. The *Craig* Court declined "to establish, as a matter of federal constitutional law, any such categorical evidentiary prerequisites for the use of the one-way television procedure." *Craig*, 110 S. Ct. at 3171. This lack of guidance as to the minimum standards "will likely encourage lower courts to uphold" child shield procedures "despite lower necessity thresholds than that of the Maryland statute." Leading Cases, *supra* note 247, at 137.

265. *Craig*, 110 S. Ct. at 3169.

266. *Id.* at 3171; see also Lang, *supra* note 175, at 368 (stating that under *Craig* "a trial court may invoke a special procedure only after it has received evidence and made a case-specific finding" of necessity).

267. See Lang, *supra* note 175, at 368.

268. *Id.* at 369-70.

269. See, e.g., Leggett v. State, 565 So. 2d 315, 317 (Fla. 1990) (reversing post-*Craig* decision because trial judge failed to make findings of fact that child would suffer moderate mental or psychological harm).

270. One observer has noted that the media attention focused on child sexual abuse "has kindled a public outcry for greater protection of children." Feher, *supra* note 5, at 228. The extreme public response, however, is "startlingly reminiscent of the Salem witch hunts and McCarthy's 'Red Scare.'" *Id.* at 228-29.

271. See generally Randall L. Hagen, Comment, *Maryland's Child Abuse Testimony Statute: Is Protecting the Child Witness Constitutional?*, 49 MD. L. REV. 463 (1990). In this pre-

trauma induced by testifying in the presence of the defendant renders a child unavailable under *Roberts*, a few state courts have adopted the *Roberts* test.²⁷² The *Craig* Court did not choose this approach perhaps because the *Roberts* requirement of unavailability applies equally to all witnesses and does not necessarily make it easier for children, as opposed to other classes of witnesses, to avoid facing the accused.²⁷³ The *Craig* majority wanted the child witness to be able both to testify and to avoid physical confrontation without demonstrating unavailability;²⁷⁴ therefore, the Court created a lower level of "necessity," called "unable to reasonably communicate," and made it applicable only to child witnesses.²⁷⁵

Advocates of criminal defendants's rights might view the *Craig* requirements as granting sex abuse defendants at least some protection from being automatically stripped of the right to physically confront their accusers. The *Craig* decision, however, may eventually weaken a criminal defendant's ability to claim this same right. The *Craig* standard is vague and the Court chose to leave it to the state courts to decide proof requirements.²⁷⁶ Relying on expert testimony or the testimony of lay witnesses, usually a parent or guardian, the trial court will be called upon to predict how the child would behave if called to testify.²⁷⁷ While merely ineffective testimony should not qualify the child to present televised testimony under the *Craig* standard, the line between being unable to communicate reasonably and providing ineffective testimony is not clear.²⁷⁸ It is almost certain that prosecutors will at-

Craig commentary, the author suggests that shielded child testimony could be constitutionally admitted if it passed the *Roberts* test of unavailability and reliability, thus fitting within established rules for Confrontation Clause exceptions. *Id.* at 483.

272. See, e.g., *Wildermuth v. State*, 310 Md. 496, 530 A.2d 275 (1987).

273. See Leading Cases, *supra* note 247, at 136. The decision must be understood "as an example of the Court's increasing willingness to interpret the Bill of Rights differently when children are concerned." *Id.*; see also Paula S. Coons, Note, *The Revision of Article 38.071 After Long v. State: The Troubles of a Child Shield Law in Texas*, 40 BAYLOR L. REV. 267, 281 n.88 (1988) (stating unavailability under *Roberts* implies that confrontation must happen in all cases unless it is not possible). *Id.*

274. *Maryland v. Craig*, 110 S. Ct. 3157, 3169-70 (1990).

275. *Id.*

276. *Id.* at 3171.

277. The *Craig* Court does not require that the child attempt and fail to "reasonably communicate" before allowing the use of televised testimony. *Id.* at 3176. Instead, the court will rely on experts whose "ability . . . to make such predictions accurately is unknown." Lang, *supra* note 175, at 369.

278. One of the prosecution's main concerns is not simply preventing harm to the child, but whether the child will make a credible witness if forced to testify in the presence of the defendant. See Owen, *supra* note 10, at 1513 n.12 (quoting Amicus Curiae Brief for American Bar Association at 9-10, *Coy v. Iowa*, 487 U.S. 1012 (1988) (No. 86-6757)). The brief stated:

Testifying in sight of the defendant may . . . weaken the state's case. The trauma may contribute to the child "freezing" on the witness stand, fidgeting, stammering,

tempt to invoke the statute whenever the presence of the defendant renders a child's testimony "ineffective," thus pushing trial courts to construe *Craig* liberally on behalf of child witnesses. Used in this way, the exception becomes a prosecutorial sword which may put many innocent defendants behind bars.²⁷⁹

While this exception is presently limited to child sex abuse victims, the *Craig* rationale can be extended to a broader class of witnesses. It is difficult to distinguish logically between children and other classes of people who may have special needs.²⁸⁰ The *Craig* Court did not address the age of the child victim, leaving it to the states to decide the maximum age at which public policy may require the use of a child shield procedure. Some state laws allow "children" as old as seventeen the benefit of these protective statutes.²⁸¹ The powers of memory and degree of impressionability of a sixteen-year-old rape victim and an eighteen-year-old rape victim differ little,²⁸² yet in some states the sixteen-year-old will be protected while the eighteen-year-old will not be protected. Certainly, both may be equally traumatized.²⁸³

The narrow reading of *Craig* is that a child sex abuse victim may avoid physical confrontation of the accused if the trial court finds that the child will be so traumatized by facing the defendant that he will be unable to communicate reasonably. But the broader reading of *Craig* is that when it is necessary to further an important public policy, a court may order the taking of televised testimony out of the presence of the defendant upon making a finding of particularized need.

V. CONCLUSION

Maryland v. Craig allows child sex abuse victims to testify without physically confronting their alleged abusers if such a confrontation would render them unable to reasonably communicate. The constitutionality of this procedure is established by creating a new exception to the right to confronta-

and in general casting false doubt upon his or her credibility and veracity. If the child is unable to testify *effectively*, the case may be dismissed.

Id. (emphasis added) (omission in original).

279. One observer has noted that in divorce or custody battles "the initial allegation may either be made by the parent or by the child as coached or conditioned by the parent." Feher, *supra* note 5, at 235.

280. Elderly or developmentally disabled persons, for example, may have special vulnerabilities and yet may be found competent to testify. Lang, *supra* note 175, at 367.

281. See, e.g., R.I. GEN. LAWS § 11-37-13.2 (Supp. 1989).

282. Differences between adult and child memory capacity dwindle as children age. See, e.g., Gail S. Goodman & Vicki S. Helgeson, *Child Sexual Assault: Children's Memory and the Law*, 40 U. MIAMI L. REV. 181, 185-86, 189, 191 (1985).

283. "[R]ape victims suffer severe emotional distress or trauma while testifying, especially when face-to-face with the accused." Graham, *supra* note 48, at 560.

tion under the Sixth Amendment. For the first time, an available witnesses may testify in court and avoid facing the accused.

Craig puts some much needed restraints on states' use of child shield statutes. By imposing such restraints, the United States Supreme Court begins to offer the barest outlines of federal guidance. *Craig*, however, stops short and leaves many important questions unanswered for yet another day. In the meantime, the *Craig* Court, in the name of protecting children, has planted seeds that could have a profound impact on the nature of trials as we know them today.

Theresa Cusick